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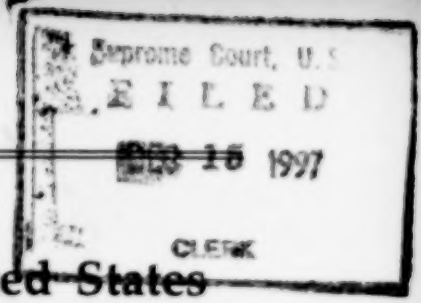

In The

Supreme Court of the United States

October Term, 1997

CASS COUNTY, MINNESOTA; SHARON K. ANDERSON, in her official capacity as Cass County Auditor; MARGE L. DANIELS, in her official capacity as Cass County Treasurer; STEVE KUHA, in his official capacity as Cass County Assessor; JAMES DEMGEN, in his official capacity as Cass County Commissioner; GLEN WITHAM, in his official capacity as Cass County Commissioner; ERWIN OSTLUND, in his official capacity as Cass County Commissioner; VIRGIL FOSTER, in his official capacity as Cass County Commissioner,

Petitioners,

vs.

LEECH LAKE BAND OF CHIPPEWA INDIANS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

Office of Cass County Attorney

EARL E. MAUS
Cass County Attorney
Counsel of Record
Cass County Courthouse
P.O. Box 3000
Walker, MN 56484
Telephone: (218) 547-7255
Counsel for Petitioners

JAMES M. SCHOESSLER
Counsel of Record
STEVEN G. THORNE
JOSEPH F. HALLORAN
JACOBSON, BUFFALO, SCHOESSLER & MAGNUSON, LTD.
Suite 810
Lumber Exchange Bldg.
10 South Fifth Street
Minneapolis, MN 55402
Telephone: (612) 339-2071
Counsel for Respondent

Of Counsel:

JAMES W. NEHER
Assistant Attorney General
State of Minnesota

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March 6, 1997 – Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit.

March 20, 1997 – Petition of Defendants-Appellees for Rehearing with Suggestion for Rehearing En Banc filed.

April 9, 1997 – Order filed Denying Petition for Rehearing with Suggestion for Rehearing En Banc.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

LEECH LAKE BAND OF CHIPPEWA INDIANS, Plaintiff, v. CASS COUNTY, MINNESOTA and in their official capacities, SHARON K. ANDERSON, CASS COUNTY AUDITOR; MARGE L. DANIELS, CASS COUNTY TREASURER; STEVE KUHA, CASS COUNTY ASSESSOR; and JOHN STRANNE, JAMES DEMGEN, GLEN WITHAM, ERWIN OSTLUND and VIRGIL FOSTER, CASS COUNTY COMMISSIONERS, Defendants.	File No. 5-95 CIV 99 NOTICE OF APPEAL (Filed December 22, 1995)

Notice is hereby given that the Leech Lake Band of Chippewa Indians, Plaintiffs in the above named case, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the final judgment of dismissal entered in this action on the 5th day of December, 1995.

Respectfully submitted,

/s/ James M. Schoessler
James M. Schoessler
Atty. Regis. No. 97433
JACOBSON, BUFFALO,
SCHOESSLER, & MAGNUSON,
LTD.

810 Lumber Exchange Building
10 South Fifth Street
Minneapolis, MN 55402
Telephone: (612) 339-2071
COUNSEL FOR THE
PLAINTIFF/APPELLANT
LEECH LAKE BAND OF
CHIPPEWA INDIANS

Dated: December 19, 1995

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
NO. 95-4263 MND

Leech Lake Band of Chippewa Indians,

Plaintiff-Appellant,

vs.

Cass County, Minnesota and, in their official capacities, Sharon K. Anderson, Cass County Auditor; Marge L. Daniels, Cass County Treasurer; and Steve Kuha, Cass County Assessor; John Stranne, James Demgen, Glenn Witham, Erwin Ostlund, and Virgil Foster, Cass County Commissioners,

Defendants-Appellees.

On Appeal From the United States District Court
For the District of Minnesota

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

OFFICE OF CASS COUNTY ATTORNEY

EARL E. MAUS
Cass County Attorney
Atty. Reg. No. 143704
Cass County Courthouse
P.O. Box 3000
Walker, Minnesota 56484
(218) 547-7255
ATTORNEYS FOR
DEFENDANTS-APPELLEES

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPEAL NO. 95-4263 MND

District Court/Agency Case Number: 5-95-99

I express a belief, based on a reasoned and studied professional judgment, that the decision is contrary to the following decisions of the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

County of Yakima v. Yakima Indian Nation, 502 U.S. 251, 112 S. Ct. 683 (1992)
Goudy v. Meath, 203 U.S. 146, 27 S. Ct. 48 (1906)

/s/ Earl E. Maus
Earl E. Maus

I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following question of exceptional importance:

1. Does the free alienability of tribal land owned in fee render that land subject to ad valorem taxation?

/s/ Earl E. Maus
Earl E. Maus

I. PETITION

Pursuant to Rule 35(a) of the Eighth Circuit Rules of Appellate Procedure and Rule 40 of the Federal Rules of Appellate Procedure, Defendants-Appellees ("Cass County") hereby petition this Honorable Court for a

rehearing with suggestion for rehearing en banc on the grounds that, in the opinion of counsel for Cass County, the Eighth Circuit Panel's decision (1) raises issues of exceptional public importance, and (2) is contrary to decisions of the United States Supreme Court.

II. PRELIMINARY STATEMENT

This petition seeks rehearing of the Circuit Panel's decision that the free alienability of tribal land owned in fee does not render that land subject to ad valorem taxation. Cass County submits that the Circuit Panel's decision is contrary to the United States Supreme Court decisions in *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 112 S. Ct. 683 (1992) and *Goudy v. Meath*, 203 U.S. 146, 27 S. Ct. 48 (1906).

III. BASIC FACTS

The land parcels in question in this case are owned by Plaintiff-Appellant Leech Lake Band of Chippewa Indians ("the Band") in fee simple. These parcels originally entered the marketplace in two different ways: (1) Allotment by the United States Government to individual Indians under section 3 of the Nelson Act "in conformity with" the General Allotment Act of 1887 ("the GAA"), with subsequent purchases and sales and ultimate reacquisition in fee simple by the Band; and (2) sale by the United States Government under the Pine Land and Homestead provisions of the Nelson Act (sections 4 and 5 and section 6, respectively) with subsequent reacquisition in fee simple by the Band.

The Circuit Panel held that, pursuant to section 6 of the GAA as amended by the Burke Act of 1906, the parcels originally allotted under the Nelson Act in conformity with the GAA, so long as they are patented in fee after passage of the Burke Act, are subject to ad valorem taxation by Cass County. The Panel held, however, that the parcels originally sold under the Pine Land and Homestead provisions of the Nelson Act, notwithstanding that they are freely alienable, are not subject to ad valorem taxation by the County.

IV. THE MAJORITY OPINION HOLDING THAT THE ALIENABILITY OF THE TRIBAL LAND IN THIS CASE DOES NOT RENDER IT SUBJECT TO AD VALOREM TAXATION IS CONTRARY TO THE UNITED STATES SUPREME COURT DECISIONS IN THE *YAKIMA* AND *GOUDY* CASES.

A. In Holding That The Tribal Land In The *Yakima* Case Was Subject To Ad Valorem Taxation, The United States Supreme Court Relied On The Reasoning In The *Goudy* Decision And Made It Clear That Neither Section 6 Of The GAA Nor The Burke Act Proviso Amending Section 6 Was Necessary To Its Decision.

In *Yakima* the Court stated with respect to the *Goudy* decision:

> But (and now we come to the misperception [on the part of the Yakima Nation and its Amicus United States] concerning the *structure* of the General Allotment Act) *Goudy* did not rest exclusively, or even primarily, on the § 6 grant of personal jurisdiction over allottees to sustain

> the land taxes at issue. Instead, it was the *alienability of the allotted lands* – a consequence produced in these cases not by § 6 of the General Allotment Act, but by § 5 – that the Court found of central significance.

502 U.S. at 263, 112 S. Ct. at 690 (emphasis by Court, footnote omitted). And specifically with respect to the Burke Act proviso which permitted the issuance of fee patents to certain allottees prior to expiration of the 25-year trust period prescribed under the GAA, but which did not subject an Indian owner of land to *plenary* state jurisdiction, the Court stated that the fact the proviso freed the land of "all restrictions as to sale, encumbrance or taxation," merely "*reaffirmed* for such *'prematurely'* patented land what § 5 of the General Allotment Act implied with respect to patented land generally: subjection to state real estate taxes." 502 U.S. at 264, 112 S. Ct. at 691 (emphasis added, footnote omitted). As the dissent in this case stated with respect to this language from *Yakima*:

> It is clear that the *Yakima County* Court's analysis of the Burke Act was nothing more than additional support for its holding that alienability resulted in taxability. As the Court stated:
>
> > [T]he [Burke Act] proviso *reaffirmed* for such "prematurely" patented land what § 5 of the General Allotment Act implied with respect to patented land generally: subjection to state real estate taxes.
>
> *Yakima County*, 507 U.S. at 264 (emphasis added). I note that, as a matter of plain logic, a "reaffirmation" supports, rather than controls, a

> conclusion. In addition, rather than being limited by the Burke Act's provision for the taxation of only prematurely patented land, the *Yakima County* Court allowed taxation over all land allotted under the General Allotment Act. *See id.* at 270.

Dissenting Opinion at 20.

As a further clarification of its holding, the *Yakima* Court, apparently in response to an expression of concern by *Amicus Curiae* United States, made it clear that, as to the question of taxability, it mattered not at all whether land was originally patented in fee pursuant to Section 5 of the GAA (after expiration of the 25-year trust period) or pursuant to the Burke Act proviso as "prematurely" patented land. The Court said in no uncertain terms:

> Since the [Burke Act] proviso is nothing more than an acknowledgment (and clarification) of the operation of § 5 with respect to all fee-patented land, it is inconsequential that the trial record does not reflect "which (if any) of the parcels owned in fee by the Yakima Nation or individual members originally passed into fee status pursuant to the proviso, rather than at the expiration of the trust periods. . . . " Brief for United States as Amicus Curiae 13, n. 10.

County of Yakima, 502 U.S. at 264, 112 S. Ct. at 691, n. 4. In other words, freely alienable land held in fee is subject to ad valorem taxation irrespective of how it was originally patented.

In sum, the *Yakima* Court explained in painstaking detail the reasoning underlying its straightforward holding that:

> [W]hen § 5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes.

County of Yakima, 502 U.S. at 263-64, 112 S. Ct. at 691. As the dissent recognized, that reasoning did not include reliance on the Burke Act proviso as necessary to the Court's holding of taxability.

B. The Majority Opinion Misinterprets The Reasoning Underlying The Disallowance Of The Excise Tax In The *Yakima* Decision.

As the Majority Opinion in this case points out, the *Yakima* decision, while holding that the GAA authorized Yakima County to impose an ad valorem tax on tribal land, held that it did not authorize imposition of an excise tax on sales of that land. Majority Opinion at 10. The Majority Opinion concluded that:

> If alienability always equals taxability, it should be the nature of the property right, not the nature of the tax, that matters. If that were the rule, the Court should have upheld both the ad valorem and the excise taxes levied by the County since the land was made alienable by the GAA.

Id. Cass County submits that this conclusion is incorrect.

Rather than basing its excise tax holding on the nature of the Tribe's ownership interest in the property in question, the *Yakima* Court made it clear that the difference in the *incidence* of the two taxes was the determinative factor leading to the conclusion that the GAA, while authorizing an ad valorem tax on tribal land, did not

authorize an excise tax on *sales* of that land. In construing the language "taxation of land" not to encompass a tax on such sales, the Court said:

> To render this [the excise tax] a "taxation of land" in the narrow sense, it does not suffice that, under Washington law, the excise tax creates "a specific lien upon each piece of real property sold from the time of sale until the tax shall have been paid. . . . " Wash. Rev. Code § 82.45.070 (1989). A lien upon real estate to satisfy a tax does not convert the tax into a tax upon real estate. . . .
>
> The short of the matter is that the General Allotment Act explicitly authorizes only "taxation of . . . land," not "taxation with respect to land," "taxation of transactions involving land," or "taxation based on the value of land." Because it is eminently reasonable to interpret that language as not including a tax upon the sale of real estate, our cases require us to apply that interpretation for the benefit of the Tribe. Accordingly, Yakima County's excise tax on sales of land cannot be sustained.

County of Yakima, 502 U.S. at 269-70, 112 S. Ct. at 693-94.

Thus, it is clear that the *Yakima* Court did not draw a distinction between the ad valorem tax and the excise tax based on the nature of the Tribe's ownership interest in the real estate. It drew a distinction between them based on the conclusion that the GAA authorized only a tax whose incidence is on the land itself, not a tax whose incidence is on "transactions involving land." *Id.* For this reason, the *Yakima* Court's holding that the excise tax is unenforceable as outside the purview of the GAA is

separate and apart from its holding on the ad valorem tax issue, and in no way implies that the Court would have upheld the excise tax if Cass County's reading of *Yakima* were correct.

CONCLUSION

The Majority Opinion in this case, in holding that the Supreme Court in *County of Yakima* found the Burke Act proviso necessary to its decision, misapprehends the thrust of that decision. *Yakima*, in upholding imposition of the ad valorem tax, clearly based its ruling not on the proviso but on the free alienability of the land in question. For that reason, the Majority Opinion is not in accord with the holding in *Yakima*, and rehearing by the Court *en banc*, as suggested by Petitioner Cass County, is warranted.

Dated: March 20, 1997

Respectfully submitted,

OFFICE OF CASS COUNTY ATTORNEY

/s/ Earl E. Maus
EARL E. MAUS
Cass County Attorney
Atty. Reg. No. 143704
Cass County Courthouse
P.O. Box 3000
Walker, Minnesota 56484
(218) 547-7255
ATTORNEYS FOR DEFENDANTS-APPELLEES

Nonintercourse Act of 1834, 4 Stat. 730, 29 U.S.C. § 177 (1996)

§ 177. Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian Nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

LEGISLATIVE HISTORY

INDIAN WELFARE – NAVAJO AND HOPI TRIBES

For text of Act see p. 227

Senate Report No. 1123, Feb. 23, 1960
[To accompany S. 2456]

House Report No. 1648, May 24, 1960
[To accompany S. 2456]

The House Report is set out.

House Report No. 1648

THE Committee on Interior and Insular Affairs, to whom was referred the bill (S. 2456) to amend the act of April 19, 1950 (64 Stat. 44; 25 U.S.C. 635), to better promote the rehabilitation of the Navajo and Hopi Tribes of Indians, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of S. 2456 is twofold. First, it amends the Navajo-Hopi Rehabilitation Act of April 19, 1950 (64 Stat. 44; 25 U.S.C. 633), to permit the Navajos to dispose of fee lands owned by the tribe without Federal supervision and to provide for transfer of tribal lands to tribally owned or municipal corporations. Second, the bill amends the act of August 9, 1955 (69 Stat. 539), as amended, to allow 99-year leases of Navajo Indian land to be made. Two bills, H.R. 9382 and H.R. 11627, introduced by Representative Udall, were considered by the Committee on Interior and Insular Affairs with S. 2456.

NEED FOR THE BILL

The Navajo Tribe has acquired in recent years with its own funds approximately 100,000 acres in fee simple. Under the provisions of Revised Statutes 2116 (25 U.S.C. 177), it appears that no one can safely acquire these lands by purchase or otherwise without the consent of the United States. Tuscarora Indian Nation v. Federal Power Commission, 265 F.2d 338 (C.A., D.C. 1958); Tuscarora Nation v. Power Authority of the State of New York, 257 F.2d 885 (C.A.2, 1958). This, of course, operates as a limitation on the power of the tribe to dispose of them as it sees fit. The committee believes that this disability should be removed in the case of the Navajo Tribe and that it should be free to manage its free [sic] simple lands as it wishes.

A further amendment to section 5 of the Navajo-Hopi Act of 1950 will authorize the Secretary of the Interior, upon request of the Navajo Tribal Council, to transfer to any corporation owned by the tribe and organized pursuant to State laws, or to any municipal corporation organized under State law, legal title to or a leasehold interest in unallotted lands held by the Navajo Indian Tribe. Upon such transfer the United States would relinquish responsibility for the lands but, if so requested by the tribe, the Secretary of the Interior would render advice and assistance in their management. The enactment of this provision will assist the tribe in creating municipal organizations within the reservation and in setting up such enterprises as a tribal housing authority which would manager the realty turned over to it by the tribe.

Each of these amendments is recommended in recognition of the Navajos' ability and willingness to assume greater responsibilities in the management of their affairs.

Section 2 amends the Indian Leasing Act of 1955 to permit 99-year leasing on the Navajo Reservation. The need for longer term leasing authority than is now available stems from the need for financing improvements through bank and insurance company loans. A 50-year lease – the longest that can now be entered into – usually has less than 50 years to run by the time the lessee concludes his negotiations for a loan. Thus the lessee is prevented from obtaining a loan from a national bank or on the basis of a federally insured loan because the statutes preclude loans secured by the mortgage of a leasehold estate if the lease does not, at the time of the loan, have at least 50 years to run (12 U.S.C. 371, 1707, 1713).

There is prospect for the establishment of several enterprises, including a $7 million sawmill, a $150 million powerplant, byproduct industries, and a home-construction project, on the reservation of satisfactory leasing arrangements can be made.

The committee was assured that the extension to the Navajo Tribe of permissible 99-year leasing does not mean that all leases will be granted for the maximum term and that the Secretary of the Interior will not approve leases for terms that are longer than needed to obtain the best results for the Indian owner and to finance optimum economic development.

COST

The enactment of S. 2456 will entail no expenditure of Federal funds.

DEPARTMENTAL REPORT

The favorable reports of the Secretary of the Interior and the Bureau of the Budget, dated September 1, 1959, and August 24, 1959, respectively, are as follows:

U.S. Department of the Interior,
Office of the Secretary,
Washington, D.C., September 1, 1959.

Hon. James E. Murray,
Chairman, Committee on Interior and Insular Affairs,
U.S. Senate, Washington, D.C.

Dear Senator Murray: Your committee has requested a report on S. 2456, a bill to amend the act of April 19, 1950 (64 Stat. 44; 25 U.S.C. 635), to better promote the rehabilitation of the Navajo and Hopi Tribes of Indians.

The bill deals with a number of different subjects and we shall discuss them separately.

1. Section 5 of the Navajo-Hopi Rehabilitation Act authorities 25-year leases, with an option to renew for one additional term of 25 years, for five specified purposes which are public, religious, educational, recreational, and business. The bill makes two changes:

(a) It adds "residential" to the list of purposes for which leases may be made.

(b) It permits leases of Navajo tribal land to be for a term of not to exceed 99 years, rather than for a term of not to exceed 25 years with one 25-year renewal.

We have no objection to the first change, but it is unnecessary because the same authority is already granted by the general long-term leasing act of August 9, 1955 (69 Stat. 539). This change in the Navajo-Hopi Rehabilitation Act would grant no new authority and would serve no useful purpose.

The authority for 99-year leases is desirable. The need for longer term lease authority is due to the difficulty in financing improvements through bank and insurance company loans on the basis of a 50-year lease. A 50-year lease normally has less than 50 years to run at the time the loan is negotiated by the leassee. This prevents the lessee from getting a less from a national bank or a federally insured loan because the applicable statutes preclude loans secured by the mortgage of a leasehold estate unless the lease has not less than 50 years to run (12 U.S.C. 371, 1707, 1713). If long-term lease authority is to be used effectively, it must be for a term that is long enough to permit the financing of maximum economic development.

The committee's consideration is directed to the following consideration. A bill authorizing the equivalent of 75-year leases on the Palm Springs Reservation if now pending before Congress (H.R. 6672). It is in the form of an amendment to the general long-term leasing act of August 9, 1956. In order to keep our long-term leasing authority in one place, and in order to simplify regulations, we suggest that the 99-year lease authority for Navajo lands should also be in the form of an amendment to the general long-term leasing act, rather than an amendment to the Navajo-Hopi Rehabilitation Act. If that

is done, it would be unnecessary to amend the leasing provision in the Navajo-Hopi Rehabilitation Act at all.

2. The bill provides that land owned by the Navajo Tribe in fee simple may be leased or sold by the tribe without the approval of any Federal agency.

The provision is a desirable one. The problem arises because the provisions of Revised Statutes 2116 (25 U.S.C. 177) have recently been construed by the courts to apply to lands owned by a tribe in fee simple (Tuscarora Indian Nation v. Federal Power Commission, 265 F.2d 338 (C.A., D.C. 1958), and Tuscarora Nation v. Power authority of the State of New York, 257 F.2d 886 (C.A.2, 1958)). Revised Statutes 2116 prohibits a sale or lease of land by an Indian tribe except by treaty or convention entered into pursuant to the Constitution. Congress has provided by subsequent legislation for tribal leases, but not for sales of tribal land.

Our records show that the Navajo Tribe has acquired a fee-simple title to approximately 99,100 acres of land, as distinguished from a title that is held by the United States in trust or a title that is held by a tribe subject to a restriction against alienation specifically imposed by the United States. We believe that the title should be unrestricted. Prior to the Tuscarora decisions, the assumption was that such lands were unrestricted and were not subject to Federal control. Inasmuch as we have had no control over some of these purchases, the foregoing acreage figure may be incomplete.

3. The bill authorizes the Secretary to transfer to any corporation owned by the Navajo Tribe and organized under State law, or to a municipal corporation

organized under State law, any tribal land whenever the Navajo Tribal Council requests the transfer. Thereafter the United States will have no trust responsibility for the land.

We do not know of any immediate desire on the part of the tribe to use this authority, but the grant of the authority would be a step in the right direction. The authority could be used only on request of the tribe, and even then the Secretary would be permitted to exercise his discretion in determining whether a transfer requested by the tribe would be in its best interest.

4. In summary, we recommend that –

(a) The 99-year lease authority should be recast in the form of an amendment to the general long-term leasing act of 1955.

(b) The authority to sell tribal land owned by the Navajo Tribe in fee simple without secretarial supervision should be enacted.

(c) The authority to transfer Navajo tribal property to a State corporation or municipal corporation controlled by the tribe should be enacted.

The amendments to accomplish these results are as follows:

1. On page 1, line 3, through page 2, line 19, delete the present language and insert in lieu thereof the following:

"That the second sentence of section 1 of the Act of August 9, 1955 (69 Stat. 539), is amended to read as follows: 'All leases so granted shall be for a term of not to

exceed twenty-five years, except leases of land on the Navajo Reservation and on the Agua Callente (Palm Springs) Reservation which may be for a term of not to exceed ninety-nine years, and except leases of land for grazing purposes which may be for a term of not to exceed ten years'."

2. On page 2, after line 19, insert:

"Sec. 2. Section 5 of the Act of April 19, 1950 (25 U.S.C. 635), is amended by inserting '(a)' before the present text and by adding the following subsections (b) and (c):".

The Bureau of the Budget has advised us that there is no objection to the submission of this report.

Sincerely yours,

ROGER ERNST,
Assistant Secretary of the Interior.

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
WASHINGTON, D.C., AUGUST 24, 1959.

HON. JAMES E. MURRAY,
Chairman, Committee on Interior and Insular Affairs,
New Senate Office Building, Washington, D.C.

MY DEAR MR. CHAIRMAN: This is in response to your requests for the views of the Bureau of the Budget on S. 2456, a bill to amend the act of April 19, 1950 (64 Stat. 44; 25 U.S.C. 635), to better promote the rehabilitation of the Navaho [sic] and Hopi Tribes of Indians.

The purpose of the bill is to revise section 5 of the act cited in the title so as to authorize 99-year leases of the Navaho [sic] tribal land, and to include "residential" in

the list of purposes for which leases may be made. The bill also provides that lands held in fee simple by the Navaho [sic] Tribe may be sold or leased by the tribe without restriction. And that the Secretary of the Interior may transfer any trust lands held for the Navahos [sic] to a tribal or municipal corporation upon request of the tribal counsel. All trust responsibility for such land would thereupon be terminated.

The Department of the Interior suggests that the provision of S. 2456 which would authorize leases up to 99 years for the Navaho [sic] tribal lands be recast in the form of an amendment to the act of August 9, 1956. The Department also notes that the addition of "residential" to the list of authorized purposes for which leases may be made is unnecessary since it is already covered by existing legislation.

The Bureau of the Budget would have no objection to enactment of S. 2455 if amended as recommended by the Department of the Interior.

Sincerely yours,

PHILLIP S. HUGHES,
Assistant Director for Legislative Reference.

COMMITTEE RECOMMENDATION

The Committee on Interior and Insular Affairs recommends enactment of S. 2456.